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No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

WAKE COUNTY and EMMETT CURL,
in his capacity as Wake County Assessor, *Petitioners,*

v.

EDWARD VALVES, INC., *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

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5 IPP

QUESTION PRESENTED

Whether, consistent with *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), a taxpayer may challenge a state tax pursuant to 42 U.S.C. § 1983 when the State provides the taxpayer with an adequate state-law remedy.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina (App., *infra*, 1a-12a) is reported at 343 N.C. 426, 471 S.E.2d 342. The opinion of the North Carolina Court of Appeals (App., *infra*, 13a-24a) is reported at 117 N.C. App. 484, 451 S.E.2d 641. The orders of the Wake County Superior Court (App., *infra*, 25a-27a) are unreported.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on June 13, 1996. A timely petition for rehearing was denied on September 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

1. North Carolina provides two methods for taxpayers to challenge an allegedly illegal or excessive property tax. Under the North Carolina Machinery Act, taxpayers may seek administrative review before a county board of equalization and review, with an appeal allowed to the state Property Tax Commission and then to the North Carolina Court of Appeals. N.C.G.S. §§ 105-290, 105-322, 105-345. See *Johnston* v. *Gaston County*, 323 S.E.2d 381, 382-383 (N.C. App. 1984). Alternatively, taxpayers may pay the disputed

tax and, after demanding a refund from the relevant taxing authority, "may bring a civil action against the taxing unit for the amount claimed." N.C.G.S. § 105-381(c)(2). Such refund actions

> shall be brought in the appropriate division of the general court of justice of the county in which the taxing unit is located. If, upon the trial, it is determined that the tax or any part of it was illegal or levied for an illegal purpose * * * judgment shall be rendered therefor with interest thereon at six percent (6%) per annum, plus costs, and the judgment shall be collected as in other civil actions.

N.C.G.S. § 105-381(d).

2. Respondent challenged an ad valorem property tax imposed by petitioner Wake County upon respondent's engineering drawings, arguing that assessment of the tax violated both the Equal Protection Clause of the Fourteenth Amendment and various provisions of North Carolina law. Respondent paid the tax under protest and then made a formal request for a refund. When the request was denied, respondent brought suit in state superior court pursuant to N.C.G.S. § 381 seeking "'a refund of taxes, with interest, paid on the engineering drawings.'" App., *infra*, 8a. Respondent's complaint also advanced a claim under 42 U.S.C. § 1983, requesting "damages in the amount of taxes illegally assessed and paid, plus interest, plus attorney's fees as provided by 42 U.S.C. § 1988.'" App., *infra*, 8a.

The trial court dismissed the action. App., *infra*, 25a-27a. The North Carolina Court of Appeals reversed, however, holding that the tax violated both the Equal Protection Clause of the U.S. Constitution and the tax uniformity requirements of North Carolina law. App., *infra*, 25a-27a. The North Carolina Supreme Court in turn granted review to determine whether respondent could "pursue Section 1983 remedies in addition to the state law remedies

provided by the North Carolina Machinery Act?" App., *infra*, 10a.[1] Prior to argument of the case in the North Carolina Supreme Court, this Court decided *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), holding "that Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law." *Id.* at 2355. Both parties filed memoranda calling *National Private Truck Council* to the attention of the North Carolina Supreme Court.

That court — without citing *National Private Truck Council* — proceeded to rule for respondent, holding that taxpayers *may* challenge state taxes under Section 1983 even when state remedies are available. App., *infra*, 10a-12a. While acknowledging that North Carolina law provides for refunds (*id.* at 7a), the court concluded that "'[o]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.'" *Id.* at 10a (citation omitted). Citing authority from outside the tax context, the court added that "[s]tate remedies are only relevant when a Section 1983 action is brought for a violation of procedural due process." *Ibid.* The court therefore held that "where, as in the present case, a taxpayer asserts civil rights violations under Section 1983 based upon a substantive constitutional right, he or she may pursue Section 1983 remedies regardless of the state statutory or administrative remedies provided for by the North Carolina Machinery Act." *Id.* at 11a.

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[1] The North Carolina Supreme Court also initially granted review to address two additional questions: whether the court of appeals erred in holding the tax illegal and whether that court erred in dismissing a state-law claim relating to a tax on respondent's real property. See App., *infra*, 6a-7a. Review as to those issues, however, subsequently was dismissed as improvidently allowed. *Ibid.*

Wake County then filed a petition for rehearing before the North Carolina Supreme Court, noting this Court's holding in *National Private Truck Council* that Section 1983 "should not be used to provide taxpayers relief in state tax refund cases when state law provides an adequate remedy." Pet. 5. The petition described *National Private Truck Council* as "[n]oting that federal courts could not grant **any** relief under § 1983 in state tax cases when state law provides an adequate remed[y] such as refunds"; the petition explained that the Court "then extended this rule to state courts, reasoning that § 1983 actions, whether brought in state or federal court, throw tax administration into disarray." *Id.* at 6 (boldface in original). The petition also observed that respondent had an adequate refund remedy under state law (*id.* at 6-7) and that, while state remedies "are generally irrelevant to the question of the existence of a cause of action under § 1983," the Court in *National Private Truck Council* "establish[es] a different standard when dealing specifically with state tax cases." *Id.* at 8. The North Carolina Supreme Court, however, denied the petition without opinion. App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

The decision below is flatly inconsistent with this Court's holding in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995). The Court ruled in that case that a taxpayer may not challenge a state tax under Section 1983 "when an adequate remedy is available under state law." *Id.* at 2356. The court below, in contrast, in a factual setting virtually identical to that in *National Private Truck Council*, held just the opposite: that a taxpayer "may pursue Section 1983 remedies *regardless* of the state statutory or administrative remedies provided for by [state law]." App., *infra*, 11a (emphasis added). Given its disregard for a clear holding of this Court, it is not surprising that the ruling below also is in square conflict with the uniform decisions of the many other state courts that have addressed

the availability of Section 1983 in state tax litigation since the issuance of *National Private Truck Council*.

This error is of considerable practical importance. It will lead to a significant "interfere[nce] with the administration of state taxes" in North Carolina. *National Private Truck Council*, 115 S. Ct. at 2355. Because constitutional challenges to state taxation arise with great frequency, the decision below will cause substantial confusion across the Nation. And the North Carolina Supreme Court's decision is sure to engender recurring litigation about an issue that has divided the state courts in the past (see *id.* at 2354) and that should have been settled by *National Private Truck Council*. Further review therefore is in order. Indeed, because the North Carolina Supreme Court's ruling cannot be reconciled with a recent, unanimous holding of this Court, the Court might wish to consider the possibility of summarily reversing the decision below pursuant to Sup. Ct. R. 16.1.

1. *National Private Truck Council* involved a federal constitutional challenge to a state tax; the taxpayer proceeded in Oklahoma state court "[p]ursuant to state law and § 1983." 115 S. Ct. at 2353. The state court invalidated the tax and "awarded refunds under state law, but declined to award relief under § 1983 and declined to award attorney's fees under [42 U.S.C.] § 1988." *Ibid.*; see *id.* at 2354. The taxpayer nevertheless maintained that it was entitled to declaratory and injunctive relief under Section 1983, an outcome that would have entitled it to an award of attorney's fees. But this Court affirmed the state court's decision, holding that in state tax cases state courts cannot "provide relief under § 1983 when adequate remedies exist under state law." *Ibid.*

In reaching this conclusion, the Court noted that it had held even prior to the enactment of Section 1983 that "'it is of the utmost importance to all of [the States] that the modes adopted to enforce the taxes levied should be interfered with as little as possible.'" 115 S. Ct. at 2354, quoting *Dows* v.

City of Chicago, 78 U.S. (11 Wall.) 108, 110 (1870). The Court added that "[s]ince the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration." *Ibid.* The Court accordingly held that

> we must interpret § 1983 in light of the strong background principle against federal interference with state taxation. Given this principle, we hold that § 1983 does not call for either federal or state courts to award injunctive or declaratory relief in state tax cases when an adequate legal remedy exists. Petitioners do not dispute that Oklahoma has offered an adequate legal remedy in the form of refunds. Under these circumstances, the Oklahoma courts' denial of relief under § 1983 was consistent with the long line of precedent underscoring the federal reluctance to interfere with state taxation.

Id. at 2355.

The Court's conclusion drew strong support from its prior interpretations of Section 1983. The Court gave particular emphasis to its holding in *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100 (1981), that "§ 1983 does not permit federal courts to award damages in state tax cases when state law provides an adequate remedy." 115 S. Ct. at 2356. The Court explained that

> [i]n concluding that Congress did not authorize damage actions in state tax cases brought in federal court, we found no evidence that Congress intended § 1983 to overturn the principle of federalism invoked in *Dows* and subsequently followed by the courts. Construing § 1983, we held that the case was "controlled by principles articulated even before enactment of § 1983 and followed in later decisions."

Ibid., quoting *Fair Assessment*, 454 U.S. at 115. The Court accordingly concluded that, "[j]ust as *Fair Assessment* relied upon a background principle in interpreting § 1983 to

preclude damage actions in tax cases brought in federal court, so we rely on the same principle in interpreting § 1983 to provide no basis for [state] courts to award injunctive relief when an adequate legal remedy exists"; the Court added that "[t]he availability of an adequate legal remedy renders a declaratory judgment unwarranted as well." 115 S. Ct. at 2356.

This case is in all relevant respects identical to *National Private Truck Council*. As in *National Private Truck Council*, the taxpayer here invoked both state-law remedies and Section 1983 in pursuit of a refund. As in *National Private Truck Council*, the state court held that the taxpayer was entitled to proceed under state law, found the tax unconstitutional, and remanded the case for the award of refund relief. And as in *National Private Truck Council*, the only thing that the taxpayer seeks under Section 1983 that it cannot obtain through its state-law remedy is an award of attorney's fees pursuant to Section 1988.[2] The result in the two cases therefore should be the same: recourse to Section 1983 is impermissible.

2. The decision below also cannot be reconciled with the uniform decisions of the state courts — including the highest courts of four States — that have considered the issue since *National Private Truck Council* was decided. These courts have read *National Private Truck Council* to hold "that if there is an adequate legal remedy to challenge State taxes,

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[2] Indeed, respondent's request for attorney's fees evidently is the engine driving this case. The North Carolina Supreme Court, while holding that respondent could proceed under both state law and Section 1983, also noted that "on remand to the trial court, Taxpayer may only recover the amount of taxes illegally assessed once." App., *infra*, 12a. Because state law provides for a refund, as well as for interest and costs, the only additional benefit that respondent could get from proceeding under Section 1983 would be attorney's fees.

§ 1983 cannot be used to obtain relief in either State or Federal court." *New England Legal Foundation* v. *City of Boston*, 670 N.E.2d 152, 196 Mass. LEXIS 220, *24 (Mass. Sept. 24, 1996). As the New Jersey Supreme Court explained,

> [o]ur reading of *National Private Truck* leads us to conclude that the Court has determined that Congress did not intend claims involving state tax administration to be actionable under section 1983 in state or federal court * * *. The United States Supreme Court has recognized an exception under section 1983 for challenges to a state tax system when a state provides a plain, adequate, and complete remedy.

General Motors Corp. v. *City of Linden*, 671 A.2d 560, 563 (N.J.), cert. denied, 117 S. Ct. 66 (1996). The decision below squarely conflicts with these holdings. Accord *Jade Aircraft Sales, Inc.* v. *Crystal*, 674 A.2d 834, 838 (Conn. 1996) (under *National Private Truck Council*, "unless the state remedy is inadequate, the trial court was correct in dismissing the [Section 1983] action"); *PPG Indus., Inc.* v. *Tracy*, 659 N.E.2d 1250, 1252 (Oh. 1996) ("in *Natl. Private Truck Council* * * * the United States Supreme Court held that [Sections 1983 and 1988] provide no basis for relief if the state has an adequate remedy at law"); *Kerr* v. *Waddell*, 916 P.2d 1173, 1179 (Ariz. App. 1996) ("[w]here an adequate remedy exists under state law, no relief of any kind is available in a state court action brought under § 1983 challenging the assessment or collection of state taxes"); *Buckley Powder Co.* v. *State of Colorado*, 1996 Colo. App. LEXIS 65 (March 7, 1996) (under *National Private Truck Council*, taxpayer cannot invoke Section 1983 "in state tax cases if there is a speedy and efficient state remedy"); *Sharp* v. *Direct Resources for Print, Inc.*, 910 S.W.2d 535 (Tex. App. 1995) (under *National Private Truck Council*, taxpayer cannot obtain relief under Section 1983 when it "has received an adequate remedy under state law").

3. To be sure, recourse to Section 1983 is precluded only when the state remedy is adequate. But the adequacy of the remedy that North Carolina provides to its taxpayers is not in dispute. To the contrary, before the court below respondent expressly disclaimed any challenge to the adequacy of North Carolina's remedies, maintaining that the existence of "overlapping state remedies — no matter how 'adequate' — is 'generally irrelevant to the question of the existence of a cause of action under § 1983.'" Pl. Appellee's N.C. Sup. Ct. New Br. 37 (citation omitted). The court below likewise did not take issue with the adequacy of the State's refund mechanism, holding that taxpayers "may pursue Section 1983 remedies *regardless of the state statutory or administrative remedies*" available. App., *infra*, 11a (emphasis added).

In fact, there can be no doubt that North Carolina's remedies are adequate within the meaning of the term as used in *National Private Truck Council*. As a general matter, a remedy is adequate when it offers the taxpayer an opportunity to "assert his federal rights and secure a review of them by this Court" (*Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 301 (1943); *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 513 (1981)); federal relief is unavailable if the State "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Rosewell*, 450 U.S. at 514 (citation omitted).[3] North Carolina offers just such a remedy: it provides alternative judicial and administrative

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[3] The nature of an adequate state remedy for these purposes is illuminated by decisions involving comity principles, the Tax Injunction Act, and the doctrine of equitable restraint. See *Fair Assessment*, 454 U.S. at 116 & n.8. All of these decisions involve closely related expressions of "the federal reluctance to interfere with state taxation." *National Private Truck Council*, 115 S. Ct. at 2356.

mechanisms in which taxpayers may raise all of their federal constitutional claims (see, *e.g.*, *Johnston* v. *Gaston County*, 323 S.E.2d 381, 384 (N.C. App. 1984)) and, if successful, may obtain a full refund and interest. See N.C.G.S. § 105-381. As *National Private Truck Council* itself makes clear, this sort of refund relief constitutes "an adequate legal remedy." 115 S. Ct. at 2355.[4] It therefore precludes recourse to Section 1983.

4. Although the North Carolina Supreme Court made no mention of *National Private Truck Council*, respondent offered that court two grounds on which to distinguish the decision. Respondent first suggested that *National Private Truck Council* has no application to actions for refunds or damages, as distinct from suits for injunctive or declaratory relief. And respondent also contended that *National Private Truck Council* has no bearing in actions against political subdivisions, as opposed to suits against States granted sovereign immunity by the Eleventh Amendment. Neither of these contentions has merit.

a. It follows necessarily from the analysis of *National Private Truck Council* that recourse to Section 1983 is unavailable in actions for monetary relief, as well as in those seeking declaratory or injunctive remedies. The controlling principle set out in the decision, after all, is that "federal law generally will not interfere with administration of state taxes." 115 S. Ct. at 2355. Thus, in holding that taxpayers

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[4] *National Private Truck Council* also establishes, of course, that a state remedy is not inadequate because it fails to provide for attorney's fees. See *Jade Aircraft*, 674 A.2d at 838 (in *National Private Truck Council* "the United States Supreme Court considered the relief provided to be adequate despite the fact that attorney's fees were not awarded"). See also *New England Legal Foundation*, 1996 Mass LEXIS at *24 ("when an adequate [legal] remedy exists, no attorney's fees are available pursuant to § 1988").

may not obtain declaratory relief under Section 1983, the Court explained that

> "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes ... require a like restraint in the use of the declaratory judgment procedure." * * * The declaratory judgment procedure "may in every practical sense operate to suspend collection of state taxes until the litigation ended," * * * and thus must be treated as being no less potentially disruptive than an injunction. * * * Declaratory relief in state tax cases might throw tax administration "into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law."

115 S. Ct. at 2356-2357, quoting *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299 (1943), and *Perez* v. *Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part) (first ellipses added by the Court). Precisely the same rationale applies to suits seeking monetary relief.

That point is confirmed by the Court's reliance in *National Private Truck Council* on *Fair Assessment*, where the Court held "that § 1983 does not permit federal courts to award damages in state tax cases when state law provides an adequate remedy." 115 S. Ct. at 2356. The Court in *Fair Assessment* explained in detail the imperatives underlying this understanding of Section 1983:

> [taxpayers] will not recover damages under § 1983 unless a district court first determines that [taxing authorities'] administration of the County tax system violated [the taxpayers'] constitutional rights. In effect, the district court must first issue a declaratory judgment like that barred in *Great Lakes*. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity. Moreover, the intrusiveness of such § 1983 actions would

> be exacerbated by the nonexhaustion doctrine of *Monroe* v. *Pape*, 365 U.S. 167 (1961). Taxpayers * * * would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety.

454 U.S. at 113-114.

The Court also noted that "[i]n addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme." 454 U.S. at 114. A damages action "'would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief'" as state tax officials were summoned into court "'to defend their assessments against claims for refunds as well as prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property.'" *Ibid.* (citation omitted). The Court found this sort of "intrusion," which "undoubtedly [is] present in every § 1983 claim," to be impermissible. *Ibid.*

That holding is squarely applicable here. The only difference between *Fair Assessment* and this case is that the tax challenge in *Fair Assessment* was brought in federal rather than state court. But the Court in *National Private Truck Council* treated that distinction as irrelevant. As the Court there recognized, it is a limitation on the *scope of Section 1983* that precludes use of the statute to challenge state taxes where an adequate state remedy is available. The Court therefore did "not understand § 1983 to call for courts (whether federal or state) to enjoin the collection of state taxes," noting that "an injunction issued by a state court pursuant to § 1983 is just as disruptive as one entered by a federal court." 115 S. Ct. at 2356. The same is true of actions for damages. The courts that have considered the issue therefore uniformly have held that *National Private Truck Council* "forbid[s] an award of damages for the same reasons that injunctive and declaratory relief are forbidden." *Kerr*, 916 P.2d at 1179. See *General Motors Corp.*, 671

A.2d at 565 ("neither state nor federal courts may award damages or grant either injunctive or declaratory relief when a state provides an adequate remedy"); *Buckley Powder Co.*, 1996 Colo. App. LEXIS at *14 ("federal courts could not entertain damages actions under 42 U.S.C. § 1983 in state tax cases" and "state courts are similarly limited").

b. The suggestion that the principle of *National Private Truck Council* does not apply to suits against political subdivisions of the States is insubstantial. *Dows*, the seminal decision in this area — and one that predated the enactment of Section 1983 — involved a tax levied by a city. The Tax Injunction Act, 28 U.S.C. § 1341, which is a "partial codification of the federal reluctance to interfere with state taxation" that is at work here (*National Private Truck Council*, 115 S. Ct. at 2356), precludes federal-court suits against units of local government. See, *e.g.*, *Rosewell* v. *LaSalle Nat'l Bank*, *supra*. And *Fair Assessment* itself, like this case, involved a challenge to a county tax. This application to local governments of the principle applied in *National Private Truck Council* is only logical. The rule of *National Private Truck Council* is not grounded on doctrines of sovereign immunity; instead, it derives from congressional reluctance to interfere with the workings of state and local government. Respondent's proposed distinction therefore has no substance.

5. The error committed by the court below should not stand. As the number of cases to have addressed the issue since the decision in *National Private Truck Council* demonstrates, the question of the availability of Section 1983 in state tax challenges is a recurring and very important one; indeed, prior to *National Private Truck Council* it had been among the most frequently litigated issues in all of state taxation.[5] Moreover, as this Court's opinions make clear,

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[5] See, *e.g.*, *Arkansas Writers' Project* v. *Ragland, Inc.*, 738

use of Section 1983 by taxpayers in North Carolina will be intrusive and disruptive, and will "have an undeniable chilling effect upon the actions of all County officers." *Fair Assessment*, 454 U.S at 115. The availability of attorney's fees under Section 1988, meanwhile — which motivated the taxpayers in *National Private Truck Council* and, presumably, lies behind respondent's invocation of Section 1983 here — will ensure repeated recourse to Section 1983 by taxpayers in the State. And although *National Private Truck Council* was called to the attention of the court below both prior to decision and in a petition for rehearing, that court quite remarkably failed even to mention it. In these circumstances, where the decision of the North Carolina Supreme Court "clearly fails to apply prior Supreme Court decisions because

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S.W.2d 402, 403 (Ark.), aff'd on other grounds, 481 U.S. 221 (1987); *Zizka* v. *Water Pollution Control Auth.*, 490 A.2d 509, 513 (Conn. 1985); *Backus* v. *Chilivis*, 224 S.E.2d 370 (Ga. 1976); *Raschke* v. *Blaucher*, 491 N.E.2d 1171 (Ill. App. 1986); *Harlan Sprague Dawley, Inc.* v. *Indiana Dept. of State Revenue*, 583 N.E.2d 214, 224-225 (Ind. Tax Ct. 1991); *McManus* v. *Iowa*, 499 N.W.2d 726, 728 (Iowa 1993), cert. denied, 510 U.S. 1004 (1993); *Dean* v. *State*, 826 P.2d 1372, 1377-1378 (Kan.), cert. denied, 504 U.S. 973 (1992); *Porter* v. *Treasurer & Collector*, 431 N.E.2d 934 (Mass. 1982); *Department of Treasury* v. *Campbell*, 411 N.W.2d 722, 723 (Mich. Ct. App. 1987); *Burrell* v. *Mississippi State Tax Comm'n*, 536 So.2d 848, 863 (Miss. 1988); *Stufflebaum* v. *Panethiere*, 691 S.W.2d 271 (Mo. 1985); *North Dakota* v. *Quill Corp.*, 500 N.W.2d 196 (N.D.), cert. denied, 510 U.S. 859 (1993); *Holden Arboretum* v. *City of Kirtland*, 483 N.E.2d 167 (Ohio Ct. App. 1984); *Nutbrown* v. *Munn*, 811 P.2d 131, 138-139 (Or. 1991), cert. denied, 502 U.S. 1030 (1992); *Spencer* v. *South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), aff'd by an equally divided Court, 471 U.S. 82 (1985); *Bloomingdales by Mail* v. *Huddleston*, 848 S.W.2d 52 (Tenn. 1992), cert. denied, 509 U.S. 907 (1993); *Brower* v. *Wells*, 690 P.2d 1144 (Wash. 1984); *Hogan* v. *Musolf*, 471 N.W.2d 216 (Wisc. 1991), cert. denied, 502 U.S. 1030 (1990).

of error or oversight," summary reversal of the decision below would be appropriate. R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE AND PROCEDURE 174 (7th ed. 1993).

CONCLUSION

The petition for a writ of certiorari should be granted and the Court should consider summarily reversing the decision of the Supreme Court of North Carolina.

Respectfully submitted.

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DECEMBER 1996

APPENDIX

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

No. 34PA95.

EDWARD VALVES, INC., a Delaware corporation

v.

WAKE COUNTY, and Emmett Curl, in his capacity as Wake County Assessor.

June 13, 1996.

ORR, Justice.

This case arises out of the sale of assets by plaintiff Edward Valves, Inc. ("Taxpayer") to BTR-Dunlop, Inc. and concerns the alleged overassessment of Taxpayer's personal and real property for tax year 1990. Since 1964, Taxpayer has manufactured specialty valves for the nuclear and fossil fuel power plant industry in a manufacturing facility located in Raleigh, North Carolina. Until 10 March 1989, Taxpayer operated as a part of the Measurement and Flow Control Division of Rockwell International. On that date, all of Taxpayer's assets were sold to BTR-Dunlop, Inc., and as a result of that sale, Taxpayer became a separate Delaware corporation.

Because the sale to BTR-Dunlop, Inc. was an asset sale, Taxpayer was required by federal tax law to allocate the consideration paid for all of the purchased assets. In connection with that process, the firm of American Appraisal Associates, Inc. appraised all of Taxpayer's assets, including approximately 200,000 engineering drawings Taxpayer had created since 1908 and retained at the Raleigh facility. These engineering drawings are custom-made and contain technical engineering specifications needed to create a particular valve as required by its customers. As a result of the appraisal conducted by American Appraisal, the reproduction costs of

the drawings were determined to be $12,827,900. The drawings were then placed on the balance sheet and federal income tax records of the "new" Taxpayer corporation at that value.

Prior to the sale of Taxpayer to BTR-Dunlop, Inc., the cost of creating the drawings was treated as a current expense by the company and written off by the company as a current cost of doing business. Because the drawings had been expensed in the past, they had never before appeared on the company balance sheet or federal income tax records.

Under the assessment methodology used by the Wake County Assessor's Office, a business' intangible personal property and self-created intellectual property are taxed only if they are capitalized on the business' books. Defendant Wake County takes the capitalized cost—the cost shown on the books—and depreciates that cost on a straight-line basis according to the life of the asset as determined by the taxpayer. If an asset is not reflected on the business' books, it is not taxed by Wake County.

The 1990 Wake County Business Property Listing form furnished by Wake County to Taxpayer and all other businesses did not contain a schedule for the listing of intangible business property or any instructions concerning the listing of such property. Defendant Wake County made no concerted effort to discover intangible business property. According to Richard Jones, the Assistant Assessor in charge of the Personal Property and Audit Divisions within the Assessor's Office, neither he nor the business auditors had been trained in the taxation of intangible or self-created intellectual property, nor had the State Department of Revenue or any other state department or agency provided the Assessor's Office with any written guidelines or instructional materials concerning how to tax such property. In fact, the Business Personal Property Appraisal Manual provided to defendants by the Ad Valorem Section of the Property Tax Division of the North Carolina Department of Revenue states

that "intangible property may represent tremendous value; however, it is usually not subject to physical measurements." Further, the manual states that "[w]here a new owner will acquire an existing business," such an acquisition can occur as either a stock sale or an asset sale but that "[i]n each case, our first goal in making our appraisal is to use the actual historical cost." Counties are explicitly warned against "using selling price as the determinant of value." Finally, the Assessor's Office itself had adopted no written guidelines concerning the taxation of intangible and self-created intellectual property; none had been furnished to the County's auditors; and Jones was aware of no county in North Carolina, other than Wake County, which seeks to tax intangible personal property or seeks to have a taxpayer list such property.

As a result of the asset acquisition, Taxpayer's Wake County business property listing for ad valorem tax purposes for tax year 1990 changed substantially. Whereas, under the 1989 listing, Taxpayer reported fixed assets at a cost of $27,581,804, those same fixed assets, with the exception of $593,457 in additional fixed assets added in 1989 and $120,000 disposed of during that same year, were listed at a cost of $40,015,802 on Taxpayers' 1990 Wake County Business Property Listing form. Included in those fixed assets was the $12,827,900 in engineering drawings. Taxpayer listed the engineering drawings and their values on the Wake County listing forms because it was informed by the Wake County Assessor's Office that it was required to use the new acquisition cost rather than the historical cost and that the engineering drawings had to be listed if they were on Taxpayer's books. As a result of the County's use of the new acquisition costs rather than the historical costs of the engineering drawings, Taxpayer's property tax bill increased by $390,082, with over $190,000 of the increase attributable to the value of the engineering drawings. The total amount of assessed value of all other discovered intangible property

for tax year 1990 in Wake County was $2,414,926; of that amount, apart from that paid by Taxpayer, only $479,186 in total assessed value of intangible property actually had taxes paid on it. Thus, Taxpayer's engineering drawings resulted in a payment on an assessed value of more than twenty-seven times greater than the total amount paid by all other businesses on intangible property in Wake County combined for the tax year 1990.

After receiving the increased tax bill, Taxpayer attempted to file an amended listing using the historical costs, but Wake County rejected this amendment. After the Assessor's Office rejected the attempted amendment, Taxpayer timely paid the assessed taxes under protest and made a formal post-payment request for refund on the grounds that it had erroneously listed the engineering drawings.

In addition to the dispute surrounding the engineering drawings, Taxpayer had earlier served its appeal on the Wake County Board of Equalization and Review concerning its 1990 real property assessment. Notwithstanding the service of the appeal, Taxpayer was never given a hearing on the assessment of its real property by the Wake County Board of Equalization and Review because, according to defendant Wake County's records, the appeal was unperfected.

After defendant Wake County denied Taxpayer's request for refund, Taxpayer brought this action against defendant Wake County and Emmett Curl in his capacity as Wake County Assessor (collectively, "defendant Wake County") under N.C.G.S. § 105-381(c)(2), which allows a taxpayer to seek judicial review of an assessment directly in Superior Court by paying taxes and then bringing suit against the taxing unit for refund of taxes paid if the assessment was a tax imposed through clerical error, an illegal tax, or a tax levied for an illegal purpose. In addition, Taxpayer brought the action under 42 U.S.C. § 1983.

In its complaint, Taxpayer asserts, among other allegations, the following: (1) that the taxes assessed are illegal on the grounds that defendant Wake County does not uniformly assess intangible personal property, such as Taxpayer's engineering drawings, for taxation, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the uniformity of taxation requirements of Article V, Section 2(2) of the North Carolina Constitution; (2) that Taxpayer listed the value of its engineering drawings by mistake and that such listing constituted "clerical error" justifying refund under N.C.G.S. § 105-381(a)(1)(a); (3) that the listing form used by defendant Wake County fails to specify intangible business property as taxable property to be listed; (4) that pursuant to 42 U.S.C. § 1983, the tax assessments on the engineering drawings administered and enforced by the County Assessor under color of state law violates the company's rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution; and (5) that Taxpayer's real property was overvalued, and the County wrongfully denied its right to appeal the 1990 real property assessment to the County Board of Equalization and Review.

The trial court entered summary judgment as to these claims in favor of defendant Wake County and dismissed the action. Subsequently, Taxpayer appealed to the Court of Appeals, contending that the engineering drawings were "self-created intangible property" which defendant Wake County taxed only when a business was sold; therefore, defendant Wake County's assessment methodology violated constitutional requirements of uniformity and equal protection.

The Court of Appeals reversed the trial court's determination, holding that defendant Wake County's "methodology for taxing self-created intangible property is unconstitutional under both the Federal and State Constitutions and also violates North Carolina General

Statutes § 105-284(a) and 42 [U.S.C.] § 1983." *Edward Valves, Inc.* v. *Wake Co.*, 117 N.C.App. 484, 493, 451 S.E.2d 641, 647 (1995). The Court of Appeals held that the tax was an illegal tax under N.C.G.S. § 105-381 because defendant Wake County's assessment methodology was based on a "purposeful, though somewhat informal, classification based upon an improper distinction between taxpayers who owned the same class of property, self-created intangibles that have been sold and similar intangibles that have not been sold." *Id.* at 492, 451 S.E.2d at 647. The Court of Appeals also reversed the trial court's order granting summary judgment in favor of defendant Wake County on Taxpayer's real property claim. The Court of Appeals remanded the action for further proceedings consistent with its opinion.

On 20 January 1995, defendant Wake County filed a petition for a writ of supersedeas under Rule 23 of the North Carolina Rules of Appellate Procedure and a motion for temporary stay, which was allowed on 9 February 1995. On 6 February 1995, defendant Wake County filed a petition for discretionary review pursuant to N.C.G.S. § 7A-31 and a notice of appeal of a constitutional question pursuant to N.C.G.S. § 7A-30. On 20 February 1995, Taxpayer filed a motion to dismiss defendant Wake County's appeal and response to petition for discretionary review. On 6 April 1995, this Court granted defendant's petition for discretionary review, denied Taxpayer's motion to dismiss, granted the requested writ of supersedeas of the judgment of the Court of Appeals, and dissolved the temporary stay.

On appeal to this Court, defendant Wake County presents three issues for review: With respect to the issue of whether the Court of Appeals erred in holding that the County's taxation of Taxpayer's engineering drawings constitutes an illegal tax in violation of the Equal Protection Clause of the United States Constitution, U.S. Const. amend. XIV, and uniformity requirements of Article V, Section 2(2) of the North Carolina Constitution, N.C. Const. art. V, § 2(2), we

hold that discretionary review was improvidently allowed. With respect to the issue of whether the Court of Appeals erred in reversing the trial court's order dismissing Taxpayer's real property claim, we again hold that discretionary review was improvidently allowed.

The sole issue remaining before this Court is whether 42 U.S.C. § 1983 is an available avenue of relief upon which Taxpayer may base his equal protection claim. Defendant Wake County contends that Taxpayer is not entitled to relief under Section 1983 because, under *Johnston* v. *Gaston Co.*, 71 N.C.App. 707, 323 S.E.2d 381 (1984), disc. rev. denied, 313 N.C. 508, 329 S.E.2d 392 (1985), and *Snuggs* v. *Stanly Co. Dep't of Pub. Health*, 310 N.C. 739, 314 S.E.2d 528 (1984), Taxpayer has "plain, adequate and complete" remedies for appeals from taxes under the North Carolina Machinery Act. According to defendant Wake County, Snuggs and Johnston hold that absent an allegation or evidence demonstrating that a taxpayer does not have "plain, adequate or complete" remedies at state law, a taxpayer who challenges his property tax assessment cannot pursue a Section 1983 claim in state court. Defendant contends that the taxpayer must seek relief by exhausting state law remedies either by pursuing administrative remedies under N.C.G.S. § 105-345 or by paying the taxes owed and then bringing suit directly in Superior Court for a refund of taxes paid pursuant to N.C.G.S. § 105-381.

Under the North Carolina Machinery Act, a taxpayer may seek relief from an unjust property tax assessment by pursuing one of two avenues: (1) administrative review under N.C.G.S. § 105-322(g)(2) and N.C.G.S. § 105-324; followed by judicial review in the North Carolina Court of Appeals, N.C.G.S. § 105-345 (1995); and then to the North Carolina Supreme Court, N.C.G.S. § 105-345.4 (1995); or, in the alternative, (2) direct judicial review in Superior Court, by paying taxes and then bringing a suit against the taxing unit for recovery of taxes paid pursuant to N.C.G.S. § 105-381.

Section 1983 of Title 42 of the United States Code provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom or usage of any State ... subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). To state a claim under Section 1983, a plaintiff must show actual deprivation of a federal right "under color of law." See *Temkin* v. *Frederick Co. Comm'rs*, 945 F.2d 716, 719 (4th Cir.1991), cert. denied, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992). Federal rights are those secured by the United States Constitution and federal statutes. *Maine* v. *Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). "But in any given § 1983 suit, plaintiff must prove the underlying constitutional claim." *Daniels* v. *Williams*, 474 U.S. 327, 330, 106 S.Ct. 662, 664, 88 L.Ed.2d 662, 667 (1986).

In this case, Taxpayer has sought relief in its complaint from illegal taxes based upon state law under N.C.G.S. § 105-381—direct judicial review—seeking "a refund of taxes, with interest, paid on the engineering drawings." Taxpayer has also sought relief from illegal taxes based upon a separate federal law claim under 42 U.S.C. § 1983, seeking "damages in the amount of taxes illegally assessed and paid, plus interest, plus attorney's fees as provided by 42 U.S.C. § 1988." We note that, while Taxpayer's Section 1983 claim as alleged in the complaint is based on a violation of both its equal protection and due process rights under the Fourteenth Amendment to the United States Constitution, on appeal, Taxpayer seeks appellate review of its Section 1983 claim based solely on equal protection.

The Equal Protection Clause of the Fourteenth Amendment provides: No State shall "deny any person within its jurisdiction the equal protection of the laws." "The purpose of the [E]qual [P]rotection [C]lause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co.* v. *Wakefield Township*, 247 U.S. 350, 352-53, 38 S.Ct. 495, 495, 62 L.Ed. 1154, 1155-56 (1918) (issue involving denial of equal protection of the laws by the Michigan state board of tax assessors, which assessed the plaintiff's property for 1911 at full value but had assessed other lands throughout the county at one-third of their actual value). Thus, as early as 1918, the United States Supreme Court explicitly recognized the role of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in circumscribing the taxing authorities of the states, their political subdivisions, and their agents.

Here, the Court of Appeals held that "the Wake County methodology for taxing self-created intangible property is unconstitutional under both the Federal and State Constitutions and also violates North Carolina General Statutes § 105-284 and 42 [U.S.C.] § 1983." *Valves*, 117 N.C.App. at 493, 451 S.E.2d at 647. We have held above that discretionary review was improvidently allowed on the issue of whether the taxation of Taxpayer's engineering drawings violates its equal protection rights. To that extent, there is no question left as to the unconstitutionality of the County's assessment methodology. Cf. *Snowden* v. *Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497, 502-03 (1944) (listing as a "familiar example" of a denial of equal protection "a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of the law is the same as though the discrimination

were incorporated in and proclaimed by the state"). We turn to the question now before us—the propriety of Taxpayer's Section 1983 claim. Can Taxpayer pursue Section 1983 remedies in addition to the state law remedies provided by the North Carolina Machinery Act? We conclude that Taxpayer can.

"[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon* v. *Burch*, 494 U.S. 113, 124, 110 S.Ct. 975, 982, 108 L.Ed.2d 100, 113 (1990).

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

Id. (quoting *Monroe* v. *Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492, 503 (1961), overruled on other grounds by *Monell* v. *Department of Social Servs. of N.Y.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). "[L]egislative enactments ... [such as 42 U.S.C. § 1983] have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147, 158 (1974).

However, "the type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief." *Daniels*, 474 U.S. at 337, 106 S.Ct. at 678, 88 L.Ed.2d at 672 (Stevens, J., concurring). State remedies are only relevant when a Section 1983 action is brought for a violation of procedural due process. See *Zinermon*, 494 U.S. at 125-26, 110 S.Ct. at 983-84, 108 L.Ed.2d at 114; see also *Daniels*, 474 U.S. at 337, 106 S.Ct. at 677-78, 88 L.Ed.2d at 672-73 (Stevens, J., concurring). Under that circumstance,

> the constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute....

Zinermon, 494 U.S. at 125-26, 110 S.Ct. at 983, 108 L.Ed.2d at 114. On the other hand, in a Section 1983 action based on a violation of a substantive constitutional right,

> "regardless of the fairness of the procedures used to implement them," the constitutional violation is complete as soon as the prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of § 1983.

Daniels, 474 U.S. at 338, 106 S.Ct. at 678, 88 L.Ed.2d at 673 (Stevens, J., concurring); see *Zinermon*, 494 U.S. at 125, 110 S.Ct. at 983, 108 L.Ed.2d at 113.

Here, Taxpayer's Section 1983 action is based solely on a violation of equal protection—a substantive violation. In view of the foregoing authority, we are compelled to conclude that where, as in the present case, a taxpayer asserts civil rights violations under Section 1983 based upon a substantive constitutional right, he or she may pursue Section 1983 remedies regardless of the state statutory or administrative remedies provided for by the North Carolina Machinery Act. See *Williams* v. *Greene*, 36 N.C.App. 80, 84, 243 S.E.2d 156, 159 ("[A]s a general rule[,] the failure of a plaintiff to exhaust his state administrative remedies has not been considered a bar to a claim asserted under § 1983."), disc. rev. denied and appeal dismissed, 295 N.C. 471, 246 S.E.2d 12 (1978). We note, however, that on remand to the trial

court, Taxpayer may only recover the amount of taxes illegally assessed once.

We also note that the Court of Appeals' decision that Taxpayer may attack the constitutionality of the assessment methodology in a Section 1983 action in state court was based upon language found in the cases of *Long Island Lighting Co.* v. *Town of Brookhaven*, 889 F.2d 428 (2d Cir.1989), and *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). However, because *Long Island Lighting Co.* and *Fair Assessment* involved the propriety of initiating a Section 1983 action in federal court prior to exhausting remedies available in state court, we find these two cases on which our Court of Appeals relied inapplicable.

For the foregoing reasons, we hold that Taxpayer's Section 1983 claim is not barred. Thus, the Court of Appeals was correct in reversing the trial court's grant of summary judgment for defendant Wake County with respect to Taxpayer's Section 1983 claim based upon equal protection.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART; AFFIRMED AS MODIFIED IN PART AND REMANDED.

APPENDIX B

EDWARD VALVES, INC., a Delaware corporation,
Plaintiff-Appellant,

v.

WAKE COUNTY, and Emmett Curl, in his capacity as Wake County Assessor,
Defendants-Appellees.

No. 9410SC290

Court of Appeals of North Carolina

Jan. 3, 1995

JOHNSON, Judge.

Edward Valves (plaintiff) has operated a manufacturing facility employing approximately 210 persons on South Saunders Street in Raleigh since 1964. The company manufactures specialty valves for the nuclear and fossil fuel power plant industry. On 10 March 1989 all of the assets of plaintiff were sold to BTR-Dunlop, Inc. (BTR). Because the sale to BTR was an asset sale, plaintiff was required under federal law to allocate the consideration paid for all of the purchased assets. The firm of American Appraisal Associates, Inc. (American Appraisal) appraised all of the assets of plaintiff including approximately 200,000 engineering drawings on hand at the Raleigh facility. These engineering drawings contain technical engineering information needed to create the particular valve to reflect a customer's specific and unique requirements and are essentially exclusive and custom-made. Plaintiff has retained every set of engineering drawings created since 1908. The drawings occupy approximately 110 file cabinets.

Before plaintiff became a part of BTR, the cost of creation of the engineering drawings was treated as a current expense by the company and written off by the company as

a current cost of doing business. However, American Appraisal appraised the drawings currently being used based upon their reproduction cost in terms of their value as used in the continuing operation of plaintiff. Plaintiff alleged that no effort was made to determine the market value of the drawings. Accordingly, American Appraisal determined the reproduction cost of the drawings to be $12,827,900.00. The drawings were then placed on the balance sheet and federal income tax records as business property in Wake County. Because the drawings had been expensed in the past, they had never before appeared on the company's balance sheet or federal income tax records.

The 1990 listing form shows that plaintiff listed and affirmed its taxable personal property at $40,015,802.00 with approximately $12,827,900.00 attributable to engineering drawings. Taxes were then assessed on the basis of the value on the listing form. Plaintiff's Wake County business property listing for ad valorem tax purposes changed substantially from the 1989 listing.

Plaintiff contends that it listed the engineering drawings and the value of the engineering drawings as stated on the form because the Assessor's Office informed its employee, Mr. Kindsvatter, that the company was required to use the new acquisition costs rather than previous historical costs and that the engineering drawings had to be listed if they were on the company books. This resulted in an increase of $390,082.00 in plaintiff's tax bill. Only $7,824.00 was attributable to net additions to fixed assets prior to 1 January 1990. Over $190,000.00 of the increase was due to the inclusion of the value of the engineering drawings. After receiving the increased tax bill, plaintiff attempted to file an amended listing, using the historical costs. The amendment was rejected by Wake County. Plaintiff paid the assessed taxes under protest, made a formal post-payment demand for refund, and then brought this action. Plaintiff also later removed the engineering drawings from North Carolina.

Under the methodology used by the Wake County Assessor's Office, a business' intangible personal property and self-created intellectual property is taxed only if it is capitalized on the books of the business. Wake County then depreciates that cost on a straight line basis according to the life of the asset as determined by the taxpayer. If an asset is not reflected on the books of a business, it is not taxed by Wake County. Typically, a business capitalizes such property only when it sells its assets. The Wake County Assessor acknowledges that to be the general practice.

The Assessor's Office had adopted no written guidelines concerning the taxation of intangible and self-created intellectual property prior to 1993 and none were furnished to Wake County's auditors. The Assistant Assessor is not aware of any other county in North Carolina which seeks to tax intangible personal property, or seeks to have the taxpayer list such property, apart from Wake County.

The 1990 Wake County Business Property Listing form which defendants furnished to plaintiff and all other businesses did not contain a schedule for the listing of intangible personal property or any instructions concerning listing of such property. The Assistant Assessor admitted that "there is nothing [on the form] to indicate that [the taxpayer] should list intangibles or self-created intellectual property." In fact, the 1990 form contained five schedules, A through E, seeking listing only of (A) Machinery & Equipment, Furniture & Fixtures; (B) Vehicles; (C) Supplies & Materials; (D) Equipment Owned by Others in Possession of Taxpayer; and (E) Leasehold Improvements. That listing form neither mentioned the word "intangibles" nor any of the categories of property that fall within the definition of intangibles. During the 1990 tax year, Wake County relied on taxpayers to voluntarily report property which its listing form did not seek. Moreover, during the 1990 tax year, there was no concerted effort by the assessor to discover intangibles, i.e., no operating audit program of any kind.

The total assessed value of all other discovered intangible property in Wake County for the tax year 1990, other than the $12,827,900.00 attributable to plaintiff's engineering drawing, was $2,414,926.00. Thus, plaintiff's engineering drawings resulted in payments on an assessed value more than twenty-seven times greater than the total amount paid by all other businesses on intangible property in Wake County combined.

The Business Personal Property Appraisal Manual provided to Wake County by the Ad Valorem Section of the Property Tax Division of the North Carolina Department of Revenue (State Manual) deals with the situation "where a new owner will acquire an existing business." It points out that such an acquisition can occur as either a stock sale or an asset sale but that "[i]n each case, our first goal in making our appraisal is to use the actual historical cost." The counties are explicitly warned against "using selling price as the determinant of value."

On the 1993 Business Property Listing form, Wake County for the first time called for the listing of intangible personal property by business taxpayers. The form now contains a Schedule C calling for listing of "Intangible Personal Property" by type, year of acquisition, cost, and life year.

In early 1990, plaintiff appealed its real property assessment to the Wake County Board of Equalization and Review. On 28 February 1990, its agent wrote a letter to the Wake County Board of Equalization and Review placing plaintiff's real property assessment under appeal. The County Assessor's Office responded that the property owners must designate in writing any third party to represent them in appeals to the Wake County Board of Equalization and Review and enclosed a power of attorney form, an appeal form, and a copy of the property record card. Wake County claimed to have no record of any response from plaintiff or plaintiff's agent. Plaintiff contends, however, that defendants

received a facsimile copy of a power of attorney form signed by Peter M. Smith of Debenham Tewson International, another tax consulting firm, and an unsigned document dated 26 March 1990 stating that BTR had appointed Debenham Tewson International to "undertake property tax audits for their United States portfolio." Plaintiff was never given a hearing on the assessment of its real property by the Wake County Board of Equalization and Review with respect to the 1990 tax year because Wake County believed the appeal to be unperfected.

The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." North Carolina General Statutes § 1A-1, Rule 56(c) (1990).

Motions for summary judgment are an appropriate method of testing the legal sufficiency of claims presented in a complaint, including complaints which assert constitutional claims. See *Britt* v. *N.C. State Board of Education*, 86 N.C. App. 282, 357 S.E.2d 432, disc. review denied, 320 N.C. 790, 361 S.E.2d 71 (1987); *Town of Beech Mountain* v. *County of Watauga*, 91 N.C. App. 87, 370 S.E.2d 453 (1988), aff'd, 324 N.C. 409, 378 S.E.2d 780, cert. denied, 493 U.S. 954, 110 S.Ct. 365, 107 L.Ed.2d 351 (1989). Rule 56 eliminates formal trials where only questions of law are involved. *Kessing* v. *Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). Plaintiff contends that the trial court erred in granting summary judgment for defendants. Plaintiff also contends that Wake County's assessment of taxes on its engineering drawings violates state and federal constitutional equal protection and uniformity requirements. We agree.

North Carolina General Statutes Chapter 105, Subchapter II, the Machinery Act, sets forth the laws and procedures governing ad valorem property taxation in North Carolina.

Our legislature has classified property for tax purposes and determined that no class of property may be taxed except by uniform rule. North Carolina General Statutes § 105-284(a) (Cum. Supp. 1994). The rule of uniformity regarding property taxation is coextensive with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Hajoca Corp.* v. *Clayton, Comr. of Revenue*, 277 N.C. 560, 178 S.E.2d 481 (1971).

All property in North Carolina, both real and personal, is subject to property tax unless it was excluded or exempted from taxation by statute or the Constitution. North Carolina General Statutes § 105-274 (1992). In addition, both tangible and intangible property is subject to property tax. North Carolina General Statutes §§ 105-276 and 105-317.1 (1992). All taxpayers are required to list taxable property for ad valorem taxes regardless of its classification. North Carolina General Statutes §§ 105-309 (Cum. Supp. 1994), 105-311 (Cum. Supp. 1992), and 105-285 (Cum. Supp. 1994). The uniform appraisal standard requires that property be listed for taxation at its "true value in money," meaning fair market value. North Carolina General Statutes § 105-283 (1992). The uniform assessment standard requires that "all property, real and personal, shall be assessed for taxation at its true value or use value as determined under G.S. 105-283 or G.S. 105-277.6, and taxes levied by all counties and municipalities shall be levied uniformly on assessments determined in accordance with this section." North Carolina General Statutes § 105-284(a).

If a taxpayer disagrees with a county's valuation of its property, the taxpayer must pursue and exhaust its administrative remedies before resorting to the courts. North Carolina General Statutes §§ 105-322, 105-290 (Cum. Supp. 1994). Questions concerning valuation which are first presented directly to the courts are properly dismissed. *Johnston* v. *Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), disc. review denied, 313 N.C. 508, 329 S.E.2d

392 (1985). However, a taxpayer may seek judicial review of an assessment directly in superior court by paying taxes and subsequently bringing suit against the taxing unit for a refund of taxes paid if the tax was imposed through clerical error, an illegal tax, or a tax collected for an illegal purpose. North Carolina General Statutes § 105-381 (1992).

Plaintiff chose to challenge the assessor's methodology in superior court by paying the taxes, and then filing an action for a refund in court. Plaintiff alleges that the taxation of its engineering drawings was an illegal tax imposed through clerical error and that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Section 1983 of Title 42 of the U.S. Code and the uniformity requirements of the North Carolina Constitution and North Carolina General Statutes § 105-284(a).

Art. V, § 2(2) of the North Carolina Constitution provides:

> (2) Classification. Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

North Carolina General Statutes § 105-284(a) provides:

> (a) Except as otherwise provided in this section, all property, real and personal, shall be assessed for taxation at its true value or use value as determined under G.S. 105-283 or G.S. 105-277.6, and taxes levied by all counties and municipalities shall be levied uniformly on assessments determined in accordance with this section.

Plaintiff alleges as clerical error that it mistakenly listed the engineering drawings because a clerk in the Wake County Assessor's Office told plaintiff that the engineering drawings should be listed. Plaintiff's only reference to this contention is in a footnote in its brief. Since plaintiff failed to cite authority or discuss this issue in its brief, that claim is deemed abandoned and will not be addressed. N.C.R. App. P. 28(b)(5).

Plaintiff does not challenge the constitutionality or validity of a tax statute which imposes taxes on personal property, nor the valuation of the engineering drawings. Rather, plaintiff contends that the methodology which Wake County used in 1990 to tax plaintiff's engineering drawings is "illegal" and unconstitutional. Plaintiff bases that contention upon the fact that Wake County's methodology has the effect of singling out that intangible property for taxation that is in the hands of those businesses which have been the subject of asset sales. Plaintiff argues that Wake County, by following this methodology, gives different tax treatment to taxpayers owning identical classes of property. In fact, defendants admit that identical intangible self-created property which has not been the subject of an asset sale (and therefore not capitalized) has not been taxed at all.

Conversely, defendants argue that plaintiff voluntarily listed the engineering drawings and therefore plaintiff cannot complain that the property has been taxed. We do not agree. As plaintiff points out, an employee of Wake County instructed plaintiff's financial officer that plaintiff must list

the engineering drawings and that the drawings must be listed at the value at which they appeared on plaintiff's balance sheet, to-wit, the acquisition cost. Moreover, despite the fact that Wake County routinely allows amendments to intangible property listings for "mistakes," it declined to allow the plaintiff's timely attempt to amend its listing.

Defendants also argue that it should not be penalized merely because Wake County "does not have a foolproof way to ensure that every taxpayer in Wake County properly lists business assets of this kind." Defendants misapprehend the objection to their methodology. The point of contention is not just that a few taxpayers failed to list their intangibles despite the insistence of Wake County that they do so. It is rather that the very enforcement procedures by which Wake County has operated, indeed, the very message which Wake County has impliedly sent to its taxpayers, does not require the listing of self-created intangibles of the nature of engineering drawings, unless the businesses have been sold. In fact, even after Wake County amended its tax listing form in 1993, it continued to distinguish in its enforcement practices between intangible self-created property that is sold and similar property that is not sold.

This is not a situation in which occasional inequities resulting from the application of the statute should not defeat the law unless they result from hostile discrimination of the kind described in *Leonard* v. *Maxwell, Comr. of Revenue*, 216 N.C. 89, 3 S.E.2d 316, appeal dismissed, 308 U.S. 516, 60 S.Ct. 175, 84 L.Ed. 439 (1939). This was a purposeful, though somewhat informal, classification based upon an improper distinction between taxpayers who owned the same class of property, self-created intangibles that have been sold and similar intangibles that have not been sold.

While this is perhaps a case of first impression under North Carolina law, its governing principle is not new to federal jurisprudence. A holding of the United States Supreme Court is virtually dispositive here. In *Allegheny*

Pittsburgh Coal Co. v. *Webster County Commission*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), a group of coal companies challenged, under the Equal Protection Clause of the Fourteenth Amendment, a West Virginia county's assessments which were made at an assessment equal to 50% of the price paid for the property at a recent sale. The companies claimed that the methodology was unfair because comparable property that had not been recently sold was assessed at eight to thirty-five times less than the companies' property and the disparities were persistent. The Supreme Court held that the county's assessment methodology violated the Equal Protection Clause, which protects a taxpayer "from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Id.*, 488 U.S. at 345, 109 S.Ct. at 639, 102 L.Ed.2d at 698 (quoting *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623, 66 S.Ct. 445, 448, 90 L.Ed. 358, 363 (1946)).

Defendants argue that a recent United States Supreme Court case upholding California's Proposition 13, *Nordlinger* v. *Hahn*, ---- U.S. ----, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), may have overruled Allegheny by giving approval to California's adoption of an "acquisition cost" system for ad valorem property taxation. We do not agree. In fact, the majority in Nordlinger distinguished Allegheny as having properly struck down the West Virginia county's "assessment scheme" in light of the statutory and constitutional requirements of West Virginia that all property be taxed at its market value. North Carolina has the same requirements as those of West Virginia. Our system is also based upon market value. North Carolina General Statutes 105-283. As was the case in Allegheny, the Wake County tax is discriminatory and "illegal" under North Carolina law.

Federal courts dealing with corporate claims under Section 1983 of Title 42 of the United States Code have held that a corporation can sue in its own right under that statute.

See *e.g.*, *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732 (3rd Cir. 1973). Conduct which infringes upon Fourteenth Amendment rights is actionable under Section 1983, when, as is the case here, it is done under color of law. See *Long Island Lighting Co.* v. *Town of Brookhaven*, 889 F.2d 428, 432 (2nd Cir. 1989) (recognizing that taxpayers may "attack the constitutionality of the assessment methodology [in] a § 1983 action in state court.").

We hold that the Wake County methodology for taxing self-created intangible property is unconstitutional under both the Federal and State Constitutions and also violates North Carolina General Statutes § 105-284(a) and 42 U.S.C. § 1983.

Plaintiff finally argues that the trial court erred in granting defendants' summary judgment motion of plaintiff's appeal of their real property assessment. Plaintiff argues that the assessed value of its land and improvements exceeded its real value by $1,166,760.00. Defendants argue that plaintiff did not properly perfect its appeal by failing to return a power of attorney signed by the property owner authorizing the representative's appearance before the Board of Equalization and Review.

North Carolina General Statutes § 105-322(g)(2)(a) requires that a request for a hearing must be in writing or by personal appearance before the Board prior to adjournment. In the instant case, plaintiff authorized Marvin I. Poer & Company and Peter M. Smith, president of Debenham Tewson International, to act on behalf of plaintiff in matters related to the appeal of the real estate assessment. Mr. Smith, a duly authorized agent of BTR-plaintiff, on behalf of BTR, gave power of attorney to David Leach to make an appearance before the Board of Equalization and Review.

Nevertheless, there is a factual dispute between the parties. Defendants allege that Wake County did not receive the power of attorney form and that even if the form was

returned the form was inadequate to authorize Poer's appearance before the Board of Equalization and Review. Plaintiff alleges that the power of attorney form was returned and duly authorized by an agent of BTR-plaintiff. While we do not read North Carolina General Statutes § 105-322(g)(2) as requiring the filing of a power of attorney, this dispute raises genuine issues of material fact for which summary judgment was inappropriate. Thus, the trial court's order granting summary judgment on plaintiff's real property claim in favor of defendant was in error.

For the reasons stated above the trial court's summary judgment order dismissing the action is reversed and the action is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

LEWIS and THOMPSON, JJ., concur.

APPENDIX C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

91 CVS 10507

EDWARD VALVES, INC.,
a Delaware Corporation,

Plaintiff,

v.

WAKE COUNTY, and EMMETT CURL in his capacity as Wake County Assessor,

Defendants.

ORDER AND JUDGMENT

THIS CAUSE coming on to be heard by the Honorable Jack Thompson, Superior Court Judge presiding at the Court's April 20, 1993, Session of Civil Court upon the Defendants' motion to dismiss under Rule 12(b) of the North Carolina Rules of Civil Procedure, and it appearing to the Court that the First and Third claims of Plaintiff's complaint fail to state a claim for which relief may be allowed and that Defendants' motion to dismiss should be allowed as to those claims, but denied as to Plaintiff's Fourth, Sixth and Seventh claims,

IT IS NOW, THEREFORE, ORDERED and adjudged that the Plaintiff's First and Third claims are hereby dismissed. Defendants' motion to dismiss the Plaintiff's Fourth, Sixth and Seventh claims under Rule 12(b)(6) is denied.

This the 20 day of May, 1993.

_____

Honorable Jack Thompson
Superior Court Judge

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

91 CVS 10507

EDWARD VALVES, INC.,
a Delaware Corporation,

Plaintiff,

v.

WAKE COUNTY, and EMMETT CURL in his capacity as Wake County Assessor,

Defendants.

CONSENT ORDER AND JUDGMENT

THIS MATTER came on to be heard before the undersigned Superior Court Judge pursuant to Rule 54(b) N.C.R.Civ.Pro. and stipulation of the parties on Plaintiff's Fifth Claim for Relief in this action, and it appearing to the court that during 1989 Plaintiff paid $19,671.63 in Wake County property taxes on certain business personal property (patterns) which was located outside of Wake County and the state of North Carolina on January 1, 1989. This court concludes as a matter of law that the Plaintiff is entitled to a refund of such property taxes plus interest at 6% per annum.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendants refund and pay to Plaintiff $24,392.82, the amount of property tax paid on out-of-county patterns in 1989 and accrued interest thereon.

This the 1 day of December, 1993.

Honorable Robert L. Farmer
Superior Court Judge Presiding

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

91 CVS 10507

EDWARD VALVES, INC.,
a Delaware Corporation,

Plaintiff,

v.

WAKE COUNTY, and EMMETT CURL in his capacity as Wake County Assessor,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER came on to be heard before the Honorable Robert L. Farmer, Superior Court Judge sitting in Regular Civil Session on November 29, 1993, upon motion of the Defendants for summary judgment on the remaining unresolved claims in this action. It appears to the court that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is granted in favor of the Defendants against Plaintiff and that this action is hereby dismissed with costs to be taxed against the Plaintiff.

This the 1 day of December, 1993.

Honorable Robert L. Farmer
Superior Court Judge Presiding

APPENDIX D

SUPREME COURT OF NORTH CAROLINA
Tenth District

From NC Court of Appeals
(9410SC290)
From Wake
(91CVS105007)

EDWARD VALVES, INC., a Delaware Corporation

v.

WAKE COUNTY, and EMMETT CURL, in his capacity as Wake County Assessor

ORDER

Upon consideration of the petition filed by Defendants in this matter for rehearing of the decision of this Court pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th day of September 1996.

s/Orr, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of September 1996.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

Marvea J. Francis
Assistant Clerk

Supreme Court, U.S.
FILED
JAN 3 1997
CLERK

No. 96-887

In The

Supreme Court of the United States

October Term, 1996

WAKE COUNTY and EMMETT CURL, in his capacity as Wake County Assessor,

Petitioners,

vs.

EDWARD VALVES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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30 pp

RULE 29.6 LISTING

Respondent Edward Valves, Inc. has no nonwholly owned subsidiaries. Its parent corporation is M&FC Holding Co., Inc., whose parent corporation is BTR Inc., whose parent corporation is BTR Dunlop Inc., whose parent corporation is BTR Dunlop Holdings (Delaware), Inc., whose parent corporation is BTR International Ltd., whose parent corporation is BTR plc.

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STATEMENT OF JURISDICTION

For the reasons set forth in Points I & II, *infra*, Respondent Edward Valves, Inc. ("Edward Valves") contends that this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review the interlocutory order of the North Carolina Supreme Court.

STATEMENT OF THE CASE

Edward Valves commenced this action in the state trial court in 1991 by the filing of a Complaint against Petitioners Wake County and Emmett Curl, in his capacity as Wake County Assessor, (collectively referred to herein as "the County"). The Complaint contained seven claims for relief, principally, but not exclusively, related to the County's actions with regard to the *ad valorem* taxation of Edward Valves' engineering drawings for the 1990 tax year. Specifically, Edward Valves contended that the taxation of its engineering drawings violated the equal protection clauses of the federal and North Carolina Constitutions (Second Claim) and 42 U.S.C. § 1983 (Sixth Claim), that the County was estopped from taxing the engineering drawings (Third Claim), and that their taxation constituted clerical error (Fourth Claim); Edward Valves also challenged the propriety of the participation of a contingency-fee auditor in a 1990 audit of the company (First Claim). In addition to the claims relating to the taxation of the engineering drawings, Edward Valves separately challenged the circumstances under which the County denied it a hearing on an appeal to the County Board of Equalization and Review of its 1990 real property assessment (Seventh Claim) and further sought a refund on amounts paid in 1989 on certain personal property which Edward Valves contended was then located outside of the County and thus not subject to *ad valorem* taxation by the County (Fifth Claim).

On May 20, 1993, the trial court issued its Order and Judgment with respect to the County's motion to dismiss,

granting the motion with respect to Edward Valves' First and Third Claims relating to the contingency-fee auditor and estoppel. (Petitioners' Appendix ("Pet. App."), at 25a.) That Order and Judgment was not appealed. On November 19, 1993, the County filed a motion for summary judgment with respect to the four remaining claims.[1] That motion for summary judgment was granted by the trial court by Order dated December 1, 1993, with respect to Edward Valves' four remaining claims: the Second, Fourth, Sixth and Seventh Claims for Relief. Edward Valves appealed that Order to the North Carolina Court of Appeals.

In an opinion filed on January 3, 1995, the North Carolina Court of Appeals reversed the grant of summary judgment in favor of the County and remanded the action for further proceedings in accordance with its opinion. (Pet. App. 24a.) With respect to the taxation of the engineering drawings, the Court of Appeals held that the methodology used by the County violated both the federal and North Carolina Constitutions and also violated 42 U.S.C. § 1983 and § 105-284(a) of the North Carolina General Statutes. (Pet. App. 23a.)[2] The Court of Appeals held that the County's practice of taxing intangible and self-created intellectual property, such as Edward Valves' engineering drawings, only when it was capitalized by the taxpayer constituted "a purposeful, though somewhat informal, classification based upon an improper distinction between

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1. Prior to the hearing on the motion for summary judgment, the County agreed to refund taxes paid in 1989 on certain personal property located outside of the County (Fifth Claim). That agreement was embodied in a Consent Order and Judgment, entered by the trial court on December 1, 1993. (Pet. App. 26a.)

2. The Court of Appeals also ruled that Edward Valves' claim of clerical error (Fourth Claim) had been abandoned. (Pet. App. 20a.) Edward Valves did not contest that ruling.

taxpayers who owned the same class of property, self-created intangibles that have been sold and similar intangibles that have not been sold." (Pet. App. 21a.) The court also noted that the County itself conceded that it was aware of no other county in North Carolina which sought to implement a methodology such as the one challenged by Edward Valves. (Pet. App. 15a.) In ruling that the methodology was unconstitutional, the Court of Appeals stated that the holding of this Court in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), was "virtually dispositive" of the issues concerning the taxation of the engineering drawings in this case. (Pet. App. 21a-22a.) The North Carolina Court of Appeals also reversed and remanded the action on the issue of whether the County denied Edward Valves an opportunity to appeal the assessment of its real property. (Pet. App. 23a-24a.)

The County sought review of the opinion of the Court of Appeals in the North Carolina Supreme Court by way of petition for discretionary review and appeal. *(See* Pet. App. 6a.) Specifically, the County sought review of three questions: (1) "whether the Court of Appeals erred in holding that the County's taxation of [Edward Valves'] engineering drawings constitutes an illegal tax in violation of the Equal Protection Clause of the United States Constitution . . . and uniformity requirements . . . of the North Carolina Constitution" (Pet. App. 6a-7a); (2) "whether the Court of Appeals erred in reversing the trial court's order dismissing [Edward Valves'] real property claim" *(i.e.,* the denial of Edward Valves' appeal of the assessment of its real property (Pet App. 7a); and (3) "whether 42 U.S.C. § 1983 is an available avenue of relief upon which [Edward Valves] may base [its] equal protection claim." (Pet. App. 7a.)

In its opinion, issued June 13, 1996, the North Carolina Supreme Court ruled that it had improvidently allowed discretionary review with respect to the first two questions, (Pet.

App. 6a-7a), thereby reinstating the decision of the Court of Appeals in favor of Edward Valves on those claims. With respect to the third question, the Supreme Court modified the opinion of the Court of Appeals concerning 42 U.S.C. § 1983 and affirmed the earlier determination that the actions of the County violated that statute as well. (Pet. App. 12a.)

In analyzing the section 1983 question, the North Carolina Supreme Court summarized the County's contentions as (a) that Edward Valves was "not entitled to relief under section 1983 . . . absent an allegation or evidence demonstrating that [Edward Valves] does not have 'plain, adequate or complete' remedies at state law and (b) that Edward Valves was required to seek relief by first "exhausting state law remedies." (Pet. App. 7a.) The North Carolina Supreme Court explicitly rejected both contentions. Notwithstanding the existence of "overlapping state remedies," (Pet. App. 10a), the court held that the "type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief." (Pet. App. 10a, quoting *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring).) The determination as to whether section 1983 relief was available would turn on whether Edward Valves was claiming a violation of its procedural due process rights — in which circumstance the constitutional violation "is not complete when the deprivation occurs [but only] unless and until the State fails to provide due process," (Pet. App. 11a, quoting *Zinermon v. Burch*, 494 U.S. 113, 124 (1990)) — or "a violation of a substantive constitutional right." (Pet. App. 11a.) In the latter circumstance, "the constitutional violation is complete as soon as the prohibited action is taken." (Pet. App. 11a, quoting *Daniels*, 474 U.S. at 338 (Stevens, J., concurring).) Here, the North Carolina Supreme Court found, Edward Valves had demonstrated "a substantive violation" of its constitutional right to equal protection and, therefore, it could "pursue Section 1983 remedies regardless of

the state statutory or administrative remedies provided for by the North Carolina Machinery Act." (Pet. App. 11a.) The court refused the invitation to declare those statutory and administrative remedies "plain, adequate and complete" as requested by the County. Instead, the court remanded the action to the trial court, noting that "on remand to the trial court, [Edward Valves] may only recover the amount of taxes illegally assessed once." (Pet. App. 11a-12a.)

The County thereafter filed a timely petition for rehearing solely on the grounds that the North Carolina Supreme Court's decision conflicted with this Court's decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 115 S. Ct. 2351 (1995), again asserting that the state law provided an adequate remedy. That petition for rehearing was denied without opinion. (Pet. App. 28a.) Thereafter, the County filed its Petition for a Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

I.

THE INTERLOCUTORY ORDER OF THE NORTH CAROLINA SUPREME COURT IS NOT A FINAL JUDGMENT.

The sole basis of jurisdiction upon which the County relies in its Petition for a Writ of Certiorari is 28 U.S.C. § 1257. Under that statute, the United States Supreme Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." This Court has interpreted the final judgment requirement to "preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest

court of the State." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (ellipsis in original, quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). This "prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State Court." *Radio Station WOW*, 326 U.S. at 124. The requirement was "[d]esigned to avoid the evils of piecemeal review," and its "[h]istory bears ample testimony that it is an important factor in securing harmonious State-federal relations." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948). Although a decree is regarded as final "if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate," *id.* at 68, "the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up — for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Id.* The *Republic Natural Gas* Court marshaled the rationales supporting "abstention until what is organically one litigation has been concluded in the State," *id.* at 71, including the "potentiality of additional federal questions arising out of the same controversy," *id.* at 72, as well as the possibility that the case may later be resolved in a manner satisfactory to the losing party. *Id.* at 71.

Here, the Order of the North Carolina Supreme Court remanded this action to the trial court for more than a ministerial entry of judgment upon its mandate. Thus, upon remand, Edward Valves will be entitled (a) to entry of summary judgment in its favor with respect to its claim for refund under North Carolina law or damages under 42 U.S.C. § 1983,[3] (b) to move for costs

3. Unlike Rule 56 of the Federal Rules of Civil Procedure, Rule 56 of the North Carolina Rules of Civil Procedure explicitly provides that "[s]ummary judgment, when appropriate, may be rendered against the moving party." Here, the determination of the North Carolina Court of Appeals clearly contemplates entry of summary judgment in favor of Edward Valves on the issue of taxation of the engineering drawings. *(See* Pet. App. 17a.)

and attorney's fees under 42 U.S.C. § 1988, as well as the pertinent North Carolina statutory provision concerning costs and attorney's fees, and (c) to trial of its Seventh Claim concerning the assessment of its real property for the 1990 tax year. (Pet. App. 23a-24a.) These remaining matters are well beyond anything which this Court has found to be "ministerial" and, in fact, each contemplates significant remaining discretion on the part of the trial court upon remand. *See, e.g., Uphaus v. Wyman,* 360 U.S. 72, 75 (1959) (refusing to treat question as final where trial court, upon remand, retained "discretion with respect to the entry of an order to enforce the command of a subpoena for the production of correspondence"); *NAACP v. Williams,* 359 U.S. 550, 551 (1959) (refusing to find finality with respect to contempt citation when state court reserved the power to reduce the amount of the fine).

Even a prospective award of attorney's fees to Edward Valves upon remand may be resolved in a manner ultimately precluding review. First, under 42 U.S.C. § 1988(b), "the court, *in its discretion,* may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" (emphasis added). Thus, if the trial court determines, in its discretion, not to allow Edward Valves attorney's fees, the County would have no "actual, concrete injury," *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 193 (1985), from which to seek review. Second, the trial court could award attorney's fees to Edward Valves, solely (or jointly under § 1988(b)), under section 6-21.5 of the North Carolina General Statutes which provides that the court "may award reasonable attorney's fees to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." Here, the County's persistence in defending its assessment methodology in the face of the North Carolina Court of Appeals' determination that the holding in *Allegheny Pittsburgh Coal Co. v. County*

Commission of Webster County, 488 U.S. 336 (1989), was "virtually dispositive" of the issues concerning the taxation of the engineering drawings in this case, (Pet. App. 21a-22a), could constitute just such a nonjusticiable issue under the North Carolina statute entitling Edward Valves to an award of attorney's fees. *See Sunamerica Financial Corp. v. Bonham,* 328 N.C. 254, 258, 400 S.E. 2d 435, 439 (1991). In the event that Edward Valves was to obtain an award of attorney's fees solely under state law or under both state and federal law, such a judgment would be independently and adequately supported on non-federal grounds and thus not subject to review by this Court. *See* Point II, *infra.*

In any case, the judgment of the North Carolina Supreme Court is insufficiently final to permit review by this Court under 28 U.S.C. § 1257.

II.

THE JUDGMENT OF THE NORTH CAROLINA SUPREME COURT RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

This Court has "long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' " *Michigan v. Long,* 463 U.S. 1032, 1038 n. 4 (1983) (quoting *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935)). As explained by the *Long* Court, the "jurisdictional concern is that we not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.' " 463 U.S. at 1042 (quoting *Herb v. Pitcairn,* 324 U.S. 117, 126 (1945)). This Court has "power . . . to correct wrong judgments, not to

revise opinions." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). In determining whether an independent and adequate state ground exists, this Court imposes a "requirement of a 'plain statement' that a decision rests upon" such grounds. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Here, the North Carolina Supreme Court allowed the ruling of the North Carolina Court of Appeals to stand concerning the illegality of the tax on Edward Valves' engineering drawings. (Pet. App. 6a-7a.) That ruling, in addition to its federal constitutional basis, also found the tax illegal based on violations of the "uniformity requirements of Article V, Section 2(2) of the North Carolina Constitution." (Pet. App. 6a.) In addition, the Court of Appeals' ruling explicitly held that the County's "methodology for taxing self-created intangible property . . . also violates North Carolina General Statutes § 105-284(a)."[4] (Pet. App. 23a.) Despite this multiplicity of grounds — both federal and state — upon which Edward Valves prevailed, the North Carolina Supreme Court noted that "on remand to the trial court, [Edward Valves] may only recover the amount of taxes illegally assessed once." (Pet. App. 11a-12a.) The County has not sought — and indeed could not seek — review of Edward Valves' entitlement to "recover the amount of taxes illegally assessed."

Any "correction" of the North Carolina Supreme Court's views on the subject of 42 U.S.C. § 1983 would "amount to nothing more than an advisory opinion" inasmuch as "the same judgment would be rendered by the state court," *Long*, 463 U.S. at 1042: *i.e.*, Edward Valves would recover the amount of taxes illegally assessed by the County.

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4. North Carolina General Statute § 105-284(a) requires that all property be assessed at its true value and that taxes be levied uniformly by counties.

Here, the County would have this Court grant certiorari to review a question, which although perhaps "intellectually interesting," *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955), does not reach "beyond the academic or the episodic." *Id.* As the North Carolina Court of Appeals stated, the County is the only one of North Carolina's one hundred counties utilizing the methodology challenged by Edward Valves here. *(See* Pet. App. 15a.) Moreover, as the North Carolina Supreme Court held, Edward Valves "may only recover the amount of illegally assessed taxes once." (Pet. App. 12a.) Under such circumstances, the County's contention that "use of Section 1983 by taxpayers in North Carolina will be intrusive and disruptive, and will have an undeniable chilling effect upon the actions of all County officers," (Petitioners' Brief ("Pet. Br."), at 14, internal quotation omitted), provides nothing more than a speculative rationale "to satisfy a scholarly interest," *Rice*, 349 U.S. at 74, concerning a question that has not arisen under the facts presented in this case and, indeed, may never arise at all.

III.

THE DECISION OF THE NORTH CAROLINA SUPREME COURT IS NOT IN CONFLICT WITH A DECISION OF THIS COURT OR A DECISION OF A STATE COURT OF LAST RESORT.

The County contends that the decision of the North Carolina Supreme Court "is flatly inconsistent with this Court's holding in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 115 S. Ct. 2351 (1995)." (Pet. Br. at 4.) In *National Private Truck Council*, this Court — after assuming "without deciding that state courts generally must hear § 1983 suits," *id.* at 2355 — affirmed the refusal of the Oklahoma Supreme Court to grant injunctive or declaratory relief under 42 U.S.C. § 1983, holding that that statute does not "provide for injunctive or

declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists." 115 S. Ct. at 2357. The taxpayers in *National Private Truck Council* had received refunds of the taxes in question and the Oklahoma Supreme Court explicitly held that "adequate remedies existed under state law." *Id.* at 2354.

In this case, unlike *National Private Truck Council,* the North Carolina Supreme Court twice — both in its original opinion and in its denial of the County's petition for rehearing — declined the County's explicit invitation to rule that North Carolina provides an adequate remedy under its state law. Instead, the North Carolina Supreme Court held, at least implicitly, that North Carolina's statutory and administrative remedies were not adequate in the face of "a violation of a substantive constitutional right" which is "complete as soon as the prohibited action is taken." (Pet. App. 11a, quoting *Daniels v. Williams,* 474 U.S. 327, 338 (1986) (Stevens, J., concurring).) Such a holding is in accord with the rulings of this Court on the analogous issue of whether a state remedy is "plain, speedy and efficient" under the federal Tax Injunction Act, 28 U.S.C. § 1341.[5] *See, e.g. Rosewell v. LaSalle National Bank,* 450 U.S. 503, 518, 521-22 (1981) (remedy imposing "unusual hardship . . . requiring ineffectual activity or an unnecessary expenditure of time or energy" may be "inefficient;" "unusual" wait for adjudication of refund may not be "speedy"); *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 605 (1951) ("uncertainty of the adequacy of a remedy in the state courts," even with later clarification by state court, provides federal jurisdiction notwithstanding Tax Injunction Act). Moreover, the North

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5. The "principles of federalism and comity" embodied in the Tax Injunction Act formed the basis of this Court's ruling in *National Private Truck Council.* 115 S. Ct. at 2354.

Carolina Supreme Court, has, in other contexts, struggled with the issue of whether North Carolina's laws provide "meaningful backward looking relief of the sort which is adequate to satisfy minimum due process requirements." *Swanson v. North Carolina,* 335 N.C. 674, 695, 441 S.E. 2d 537, 549 (Mitchell, J., dissenting), *cert. denied,* 115 S. Ct. 662 (1994). Here, the North Carolina Supreme Court was within its rights to conclude that a state remedy that required the taxpayer to pay the contested amount of taxes and which — six years later — had still resulted in no refund to the taxpayer was not "adequate" "under the particular facts presented by the present case," *Swanson,* 335 N.C. at 695, 441 S.E. 2d at 549 (Mitchell, J., dissenting).

The other state court decisions cited by the County as putatively in conflict with the decision here, *(see* Pet. Br. 7-8), were premised, in every case, on an explicit holding by the state court that the state law remedies at issue were "adequate." Thus, in *New England Legal Foundation v. City of Boston,* 423 Mass. 602, 670 N.E. 2d 152 (1996), plaintiff appealed, in pertinent part, from the trial court's decision denying attorney's fees under 42 U.S.C. § 1988. The Supreme Judicial Court of Massachusetts held that the Massachusetts procedure for recovery of back taxes "long ago was seen as providing an adequate remedy." 670 N.E. 2d at 161 (citing cases). The court specifically found that plaintiff "had adequate State procedural avenues to bring its Federal law challenges," and that under *National Private Truck Council,* "§ 1983 would therefore not provide any relief." *Id.; see also PPG Industries, Inc. v. Tracy,* 74 Ohio St. 3d 449, 659 N.E. 2d 1250, 1252 (1996) (per curiam) (affirming refusal to grant attorney's fees under 42 U.S.C. § 1988 on grounds that plaintiff" did not prove a violation of the commerce clause" and because "Ohio provides an appellate procedure to determine these constitutional claims"); *Jade Aircraft Sales, Inc. v. Crystal,* 236 Conn. 701, 674 A.2d 834, 839 (1996) (affirming dismissal of plaintiffs § 1983 claim for lack of subject matter jurisdiction on

the grounds that the Connecticut statutory scheme provided plaintiff "an opportunity to receive an adequate legal remedy"); *General Motors Corp. v. City of Linden*, 143 N.J. 336, 350, 671 A.2d 560, 566 (refusing "to recognize a section 1983 action challenging the conduct of an assessor" based on a holding that "the remedies under New Jersey law are adequate to preclude section 1983 suits in either federal or state courts"), *cert. denied*, 117 S. Ct. 66 (1996).[6]

Unlike *National Private Truck Council* and the various state court decisions cited by the County, the North Carolina Supreme Court did not rule that the state law remedies at issue here were adequate under the circumstances faced by Edward Valves. For that reason, the decision of the North Carolina is not in conflict with any decision of this Court or any decision of a state court of last resort.

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6. The intermediate state appellate court decisions cited by the County are also each premised on an explicit holding that the state provided an adequate remedy. *See, e.g., Kerr v. Waddell*, 185 Ariz. 457, 916 P.2d 1173, 1174 (Ariz. App. 1996) (holding that "Arizona's administrative tax procedure is an adequate legal remedy," and therefore the Arizona tax court "did not have subject matter jurisdiction to hear the taxpayers' § 1983 claims absent the exhaustion of their administrative remedies"); *Buckley Powder Co. v. Colorado*, 924 P.2d 1133, 1138 (Colo. App. 1996) (holding that "adequate state remedies" were available to plaintiff and that *National Private Truck Council*, "by implication," required that state courts "could not entertain damages action under 42 U.S.C. § 1983 in state tax cases when state law furnishes an adequate legal remedy"), *cert. granted in part*, 1996 Colo. LEXIS 483 (Colo. Oct. 15, 1996); *Sharp v. Direct Resources for Print, Inc.*, 910 S.W. 2d 535, 541 (Tex. App.1995) (holding that because plaintiff "received an adequate remedy under state law," it could not obtain "the declaratory relief [it] requested pursuant to § 1983").

CONCLUSION

For all the foregoing reasons, Respondent Edward Valves, Inc. respectfully requests that this Court deny the Petition for a Writ of Certiorari.

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No. 96-887

In the Supreme Court of the United States

OCTOBER TERM, 1996

WAKE COUNTY and EMMETT CURL,
in his capacity as Wake County Assessor, *Petitioners,*

v.

EDWARD VALVES, INC., *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITIONER'S REPLY BRIEF

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In opposing the petition for certiorari in this case, respondent has remarkably little to say in defense of the judgment below. Instead, respondent attempts to confuse the issue here by denying that this Court has jurisdiction to review the case. This approach is perhaps understandable, given the patent inconsistency between the North Carolina Supreme Court's decision and this Court's holding in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995). But respondent's tactic should not succeed. Respondent's jurisdictional arguments are insubstantial, while its half-hearted suggestion that the decision below does not conflict with decisions of this and other courts cannot bear even cursory scrutiny. And respondent pointedly does not deny either that the issue here is a recurring one or that the North Carolina Supreme Court's decision likely will engender litigation across the Nation. Review of the decision below therefore is in order.

1. Respondent first asserts that the decision below is not final because upon remand it "will be entitled (a) to entry of summary judgment in its favor * * *, (b) to move for costs and attorney's fees * * *, and (c) to trial of its Seventh Claim concerning the assessment of its real property for the 1990 tax year." Br. in Opp. 6-7. This assertion entirely lacks merit.

(a) As respondent itself evidently recognizes, entry of summary judgment upon remand would be a wholly ministerial act. See Br. in Opp. 6 n.3 ("the determination of the North Carolina Court of Appeals clearly contemplates entry of summary judgment in favor of Edward Valves"). The prospect that judgment will be entered on remand therefore does not detract from the finality of the decision below. See, *e.g.*, *Department of Banking* v. *Pink*, 317 U.S. 264, 267 (1942).

(b) That respondent has yet to be awarded attorneys' fees does not call into question the finality of the North Carolina Supreme Court's decision that Section 1983 provides a cause of action here. At this point, the Section 1983 issue cannot

be revisited when respondent makes its fee request. As a consequence, this quite plainly is a case "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975). See *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982); *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963).

(c) The trial of respondent's real property assessment claim also has no bearing on the Section 1983 issue decided by the court below. That claim did not involve any federal issue and, indeed, did not proceed under Section 1983. It therefore is simply unrelated to the finality of the state supreme court's decision. See, *e.g.*, *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 278 n.7 (1980).

2. Respondent's contention (at Br. in Opp. 8-10) that the decision below rests on an independent and adequate state ground is nonsensical. The *only* question before the North Carolina Supreme Court was a federal one: whether Section 1983 may be used to challenge state taxes. The court in fact dismissed as improvidently allowed the state law issues on which it initially granted review. See Pet. 3 n.1. Needless to say, it is difficult to see how a decision about the meaning of a federal statute could be said to rest on nonfederal grounds.

In making its argument, respondent appears to believe that the holding below rests on state grounds because (in respondent's view) equivalent relief may be available under state and federal statutes. But respondent's contention involves a fundamental misunderstanding of the adequate and independent state ground doctrine. As a general matter, the "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves the Court of the necessity of considering the federal question" (*United Air Lines* v. *Mahin*, 410 U.S.

623, 630-631 (1973)); that the state court "might have, but did not, invoke state law does not foreclose jurisdiction here." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). In this case the state court expressly construed Section 1983, and its erroneous construction of that statute may be corrected by this Court.

3. Respondent maintains that the decision below does not conflict with *National Private Truck Council* or with the many state court decisions cited at Pet. 7-8 because "the North Carolina Supreme Court held, at least implicitly, that North Carolina's statutory and administrative remedies were not adequate." Br. in Opp. 11. This argument, however, rests on a plain misreading of the decision below. Far from finding North Carolina's remedies inadequate, the state supreme court expressly declared state remedies "irrelevant" (Pet. App. 10a), holding that taxpayers "may pursue Section 1983 remedies regardless of the state statutory or administrative remedies provided for by the North Carolina Machinery Act." *Id.* at 11a. The holding that state remedies are irrelevant is, of course, irreconcilable with *National Private Truck Council* and the many state court decisions that have followed it. It may be added that the court below plainly did regard North Carolina's remedies as adequate: the court cited with approval the decision in *Johnston* v. *Gaston County*, 323 S.E.2d 381 (N.C. App. 1984), which expressly held the State's remedies adequate under the Tax Injunction Act. See Pet. App. 7a. Moreover, the court hardly would have declared adequacy irrelevant had it thought the State's remedies inadequate.[1]

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[1] Respondent's suggestion (at Br. in Opp. 11-12) that the North Carolina Supreme Court's decision in *Swanson* v. *North Carolina*, 441 S.E.2d 357, cert. denied, 115 S. Ct. 662 (1994), somehow expressed doubt about the adequacy of the State's remedies is most peculiar. In fact, the court there held that the refund statute at issue (not, in any event, the one used by respondent in this case)

4. In sum, the holding below squarely conflicts with *National Private Truck Council* and with the decisions of many state courts. It finally and unambiguously resolves an important and recurring question of federal law, holding that Section 1983 may be used to challenge the constitutionality of state taxes even when an adequate state law remedy is available. It threatens to interfere with the mechanisms of state tax administration and will have mischievous effects across the Nation. Further review therefore is in order. Indeed, respondent has offered no reason to doubt that summary reversal would be an appropriate disposition of this case.

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was "free from any constitutional infirmity" (*id.* at 543); the court concluded that it provided a "clear and certain remedy and meaningful, backward-looking relief," as well as "a clear and fair opportunity to contest the tax." *Id.* at 545. Respondent also is wrong in arguing (at Br. in Opp. 11-12) that its delay in obtaining a refund might have been thought by the state supreme court to render North Carolina's remedies inadequate. The court, of course, said no such thing. And this Court has held that substantial delays in paying refunds do not make remedies inadequate, *even when the State does not pay interest on refunds that eventually are awarded*. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 520-521 (1981). Here, in contrast, the state statute provides for interest. See Pet. 2. In addition, respondent had the option of not paying the tax at all and instead seeking immediate administrative review, with an appeal of any adverse judgment to the state court of appeals. See Pet. 1.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the Court should consider summarily reversing the decision of the Supreme Court of North Carolina.

Respectfully submitted.

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